

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

TRACIE HOPE, ET AL.

RESPONDENTS,

v.

NISSAN NORTH AMERICA, INC.

APPELLANT.

**DOCKET NUMBER WD73299
MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: September 20, 2011

Appeal From:

Jackson County Circuit Court
The Honorable Jack Richard Grate, Jr., Judge

Appellate Judges:

Division Two: James M. Smart, Jr., P.J., Mark D. Pfeiffer and Cynthia L. Martin, JJ.

Attorneys:

Lawrence Benjamin Mook, Excelsior Springs, MO; Michael W. Blanton, Leawood, KS; and Kevin Daniel Stanley, Kansas City, MO, for **respondents**.

Peter Brennan, John W. Cowden, David M. Eisenberg, and Anne Elizabeth Baggott, Kansas City, MO, for **appellant**.

MISSOURI APPELLATE COURT OPINION SUMMARY

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Before Division Two: James M. Smart, Jr., P.J., Mark D. Pfeiffer and Cynthia L. Martin, JJ.

The manufacturing of Infiniti FX35 and FX45 cars began in late 2002 and by 2006, Nissan North America, Inc. ("Nissan") had become aware of instances of bubbling dashboards of FX Vehicles, namely in the "hot and humid" states of Florida, Texas, Georgia, North Carolina, and Alabama. Nissan ordered changes to the curing process used on the dashboards, after an investigation, to prevent any future bubbling instances. However, it later became apparent that the change in the curing process did not sufficiently address the dashboard bubbling problems.

In early 2010, Nissan implemented a warranty extension program for 2003-2007 FX Vehicles. Under this program, Nissan extended the warranty for FX Vehicle dashboards to eight years and unlimited mileage. Nissan agreed to replace bubbled dashboards at no cost to the consumer experiencing bubbling and to provide free loaner vehicles during dashboard replacement. Nissan also agreed to reimburse any customer who might have paid for a dashboard replacement. The warranty went into effect on issuance and was automatically fully transferrable to all future owners of the vehicle.

The Plaintiffs in this action are current owners of FX Vehicles; none have experienced dashboard bubbling. The Plaintiffs claim that every FX Vehicle owner has been damaged economically because each paid for the vehicle as though there were no latent defect to which the vehicle is subject, when in fact there is a taint that applies to the vehicle due to the possibility of dashboard bubbling. The putative class membership is based solely on "ownership" of an FX Vehicle on the theory that Nissan breached express warranties, the implied warranty of merchantability, and violated the Missouri Merchandising Practices Act ("MMPA") as a result of the alleged defect. Specifically, Plaintiffs allege that the bubbling defect diminishes the value of each FX Vehicle, regardless of whether the defect has actually manifested in any particular vehicle, because the existence of the defect places a stigma upon the Subject Vehicle that reduces its marketability and resale value.

The trial court granted Plaintiffs' motion for certification and certified the following class for *each* of the Plaintiffs' causes of action:

All persons who purchased and currently own an Infiniti FX35 or FX45, model years 2003 through 2007 inclusive, in the State of Missouri, with the dashboard installed as original manufacturer's equipment.

The trial court's order defined the putative class using the Plaintiffs' submitted definition, but the order also recognized the definition "should be further refined." Nissan appeals the class certification.

AFFIRMED IN PART; REVERSED IN PART; REMANDED

Division Two holds: The trial court erred in directing Nissan to provide assistance in further refining the class definition post-certification, as the court is without authority to require a defendant to do so. The trial court further erred in certifying the putative class for the breach of express warranty and implied warranty claims because common questions of law or fact do not predominate over questions affecting only individual class members for these causes of action. For the express warranty claim, determination of class membership would include *individual inquiries* into whether putative class members read materials distributed by Nissan, whether the defect in the dashboard manifested and damaged the class member, and whether Nissan was timely notified of the nonconformity. For the implied warranty claim, determination of class membership would require *individual determinations* of whether each putative class member actually experienced manifestation of the bubbling defect, so as to be able to maintain a cause of action, and then subsequently, individual inquiries into the extent of damage sustained, whether the alleged defect was the cause in fact or proximate cause of the damage sustained, and finally whether each individual class member notified Nissan. Thus, the overwhelming requirement of individual determinations is fatal to a showing of predominance of common questions and the trial court abused its discretion when certifying the class action for the express and implied warranty claims. The certification of the breach of express and implied warranty classes is reversed.

However, the trial court did not err in certifying a class as to Plaintiffs' claims under the MMPA because class treatment could reasonably be viewed as the superior method of adjudicating such claims. Because Nissan's conduct is the focus of many of the MMPA claims, common issues substantial predominate over individual ones and certification is affirmed.

On remand for further proceedings, the trial court shall de-certify the class treatment as to express and implied warranty claims. The trial court is also directed to strike the portion of the certification order requiring Nissan to provide assistance or counsel as to the proposed class definition or any refinements therein.

Opinion by James M. Smart, Jr., Judge

September 20, 2011

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